UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY SOWARDS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 22695

BRIEF OF APPELLEE

Appeal from the United States District Court
for the Western District of Washington
Northern Division
Honorable John C. Bowen
District Judge

EUGENE G. CUSHING
United States Attorney

MICHAEL J. SWOFFORD
Assistant United States Attorney

1012 U. S. Courthouse
Seattle, Washington 98104

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STATEMENT OF JURISDICTION

This is an action under the Federal Tort Claims Act, the District Court having jurisdiction pursuant to 28 U.S.C., § 1346(b). Final judgment was entered by the District Court on November 30, 1966 (CT 121) wherein the Court found in favor of the defendant and against the plaintiff. Notice of Appeal was filed on February 13, 1967 (CT 139), and jurisdiction of this Court arises under 28 U.S.C., § 1291.

Prior to trial, the defendant admitted limited liability in the Pre-Trial Order (CT 72) as follows:

> "The defendant hereby admits liability to the plaintiff for such personal injuries as are shown by a preponderance of the evidence at trial or by the admitted facts, to be the proximate result of the collision hereinabove described."

COUNTERSTATEMENT OF THE CASE

On July 24, 1963, appellant was driving a large tractor with 40-foot trailer designed for hauling cement across a railroad track located at the Naval Supply Depot, Seattle, Washington. As appellant's tractor cleared the track, a flatcar which was being coupled to an engine and five other cars operated by appellee, moved slightly (RT 545) and struck the appellant's trailer in the side about six feet from the rear (RT 215). The impact resulted in a "thumping or bumping" sound (RT 545). Appellant's truck and trailer continued to

clear the railroad tracks by approximately twenty feet and was then brought to a stop (RT 552), at which time appellant exited from the truck and stated that he had not been hurt (RT 553, RT 38). He also refused an offer of first aid treatment (RT 218).

After completing an accident report for the Naval authorities, appellant returned to his place of business, and then drove the truck which had been reloaded with cases of liquor, to his home in Everett, Washington. Upon his arrival in Everett, he visited his family physician who administered pain pills and muscle relaxors (RT 291).

Contrary to his doctor's advice (RT 292), appellant returned to his employment as a truck driver the morning following the collision and continued to work steadily for approximately three months until he was fired (RT 89-90, 97 and 226) in October, 1963,for misleading his employer. His duties included the lifting and moving of heavy objects (CT 98) during this time period.

From October, 1963, until the date of trial, appellant worked for a number of firms but terminated his employment with each not because of physical disability but because of personal reasons (RT 221-265). He did not miss any days of work during this period for reasons of health. Appellant's work record is as follows:

Everett Trucking Company, May through August,1964 - quit to take a better job. (RT 227)

Sound Metal, August, 1964 - appellant quit (RT 228).

Morrison Logging - worked one week running a steam shovel - quit for another job (RT228).

Provisioners - appellant quit because he didn't want to go to Denver with a co-employee (RT 228).

Fishmans Transportation Co. - worked there for three months in fall of 1964 - quit because employer wouldn't pack the front wheels of the truck, and because of personal disagreement with employer (RT 229).

Everett Trucking Company - appellant worked there again from January, 1965, until May, 1965, when he quit, evidently due to an incident in which he was involved in Los Angeles during which he "beat up" three police officers (TR 236).

Ross and Hogland - appellant worked there from June, 1965, until NOvember 27, 1965, on which date he was involved in another serious truck accident. That was the last day on which he ever worked as a truck driver (TR 236).

On November 27, 1965, appellant was driving a large truck near Merced, California, when he was involved in another accident. Appellant passed out at the wheel of the truck either from lack of sleep or from loss of blood caused by the extraction of his teeth four days prior to the accident.

He also had diabetes which could cause blacking out (TR 350). The truck and trailer hit a guard rail, breaking the trailer loose from the tractor and tipping it over. The entire cab in which appellant was sitting was lifted up in the air and went over forward, during which time appellant made several circles inside the truck striking hard objects therein (TR 239). Both the tractor and trailer were totally demolished (TR 241-242) and appellant sustained several abrasions, contusions, lacerations on his forehead and a severed facial nerve (TR 240), among other injuries.

It also should be noted that appellant was involved in other accidents prior to the one in 1963. He had previously flown an airplane through a house (TR 209) and in 1959 was involved in a rear-end collision (TR 210) which necessitated him spending nine days in the hospital.

It should be further noted that appellant's complaint was twice dismissed prior to trial for dilatory tactics. On April 8, 1966, the complaint was dismissed with prejudice because of appellant's failure to answer interrogatories (CT 13), and was dismissed a second time on June 23, 1966, for failure to prepare for trial (CT 51).

Appellant was limited to two medical expert witnesses by court order dated November 1, 1966 (CT 165). Dr. Mullins was eliminated as an appellant's witness (by deposition) because his deposition was taken, over Government objection,

only two court days prior to trial. Dr. Burgess was eliminated as a witness because his last examination of appellant was in May, 1965, prior to the November, 1965, truck accident, and Dr. Burgess had not re-examined appellant subsequent to said accident.

ISSUES PRESENTED

1. a. Whether a district court has power to limit the number of expert witnesses which a party may call.

b. Whether the district court properly eliminated Dr. Burgees and Dr. Mullins as expert witnesses.

2. Whether the district court properly excluded the results of a medical examination which was conducted on the day of trial without notice to appellee.

3. Whether records of a State of Washington administrative agency showing payment of appellant's medical bills was properly excluded when offered as the only evidence of the amount and reasonableness of said medical bills.

4. Whether a trial court has discretion to determine whether or not a witness qualifies as an expert.

5. Whether appellant's failure to prove that the appellee's negligence on July 24, 1963, was the proximate cause of his injuries, if any, at time of trial.

SUMMARY OF ARGUMENT

1. a. A trial court has discretion to limit the number of expert witnesses.

b. The testimony of Dr. Burgess was properly eliminated because he had not examined appellant subsequent to the second accident. The testimony (by deposition) of Dr. Mullins was properly eliminated because it was taken only two court days prior to trial with only one day notice to appellee.

2. The court properly excluded the results of a medical examination of plaintiff conducted on the day of trial because appellee had no notice of said examination and no discovery was possible.

3. The court properly excluded Washington State Department of Labor and Industries records showing payment of appellant's medical bills.

4. The determination of whether a witness qualifies as an expert is within the sound discretion of the trial court.

5. There was failure of proof by appellant both as to proximate cause and damages, and there was ample evidence to support the court's judgment in favor of appellee.

ARGUMENTS

GENERAL BACKGROUND

Commencing April, 1966, this case has been repeatedly delayed by the dilatory tactics of appellant. Twice dismissed with prejudice for failure to answer interrogatories, for withholding information in interrogatories, and for non-preparation of appellant's case, and then delaying several months because one of appellant's doctors went to Europe, this case has shown some considerable indulgence to appellant's delays. Appellant has now asked the Appellate Court to reverse the fairly given and lengthy trial on grounds that the trial court refused to further indulge several procedurally defective attempts of appellant to get non-admissible evidence before the Court.

I.

THE COURT PROPERLY LIMITED THE NUMBER OF MEDICAL EXPERTS.

Appellant's first contention of error is that the trial court abused its discretion by limiting the number of appellant's expert witnessess from four to two medical doctors. This limitation was allegedly made in open court on November 1,1966 but the Court's and counsels' discussion of the issue is not available inasmuch as a court reporter was not present.

The law is clear that the number of witnesses permitted to testify to a single point is within the sound judicial discretion of the trial court, the purpose of limitation of

witnesses being to prevent cumulative evidence. Suhay v. United States, 95 F2d 890 (10 Cir. 1938), cert. denied 304 US 580; Chapa v. United States, 261 Fed. 775 (5 Cir. 1919), cert.den. 252 US 583; Burgman v. United States, 188 F2d 637 (D.C. Cir. 1950), cert. denied 72 S.Ct. 1964).

Rule 83 of the Federal Rules of Civil Procedure gives each District Court the power to make and amend rules governing its practices. Pursuant to said authority, Rule 28(d) of the Rules for the United States District Court for the Western District of Washington provides as follows:

> "Except as otherwise ordered by the Court, a party shall not be permitted to call more than one expert witness on any subject."

Being permitted to call two medical doctors, appellant was accordingly entitled to call more expert witnesses than the Rule permits. This is especially significant in view of the fact thatthe appellee limited itself to one expert witness on the subject of appellant's physical condition.

Of greater significance is appellant's allegation that the court arbitarily determined which of appellant's four doctors could appear as witnesses. This ruling was allegedly made at an unreported hearing on November 1, 1966. The fact is thatthe Court eliminated Doctors Burgess and Mullins for good reason, rather than arbitarily picking at random which of the four doctors could testify. The reasons for eliminating Dr. Burgess and Dr. Mullins are as follows:

1. Dr. Burgess, an orthopedic surgeon, examined appellant on only two occasions, in 1964 and in May, 1965. He did not examine plaintiff at any time after the November 27,1965, accident in California in which plaintiff sustained serious injury. Accordingly, Dr. Burgess' testimony would have been limited to appellant's condition prior to the November 27, 1965, accident. It should benoted that Dr. Burgess did have an opportunity to examine appellant after the second accident, inasmuch as the trial was delayed for several months so that Dr. Burgess could go to Europe. He returned on October 10, 1966, but appellant did not arrangefor any examination prior to trial. Since Dr. Burgess' testimony would have been limited to showing appellant's condition before the second accident, his testimony would have been cumulative inasmuch as Dr. Garner testified as to appellant's condition both before and after the second accident, and Dr. Grossman testified as to his condition subsequent to the second accident. Dr. Burgess would have been unable on the basis of his examination to segregate damages between the first and second accidents as required by law.

2. Dr. Mullins: The defense had never heard of Dr. Mullins until three court days prior to trial. At that time (October 27, 1966) appellant orally moved the court for an order allowing the taking of Dr. Mullins deposition on the following day (October 28, 1966) in order to perpetutate his

testimony inasmuch as he would be out of town on date of trial. This was insufficient notice in violation of Rule 30 of the Federal Rules of Civil Procedure which provide:

> "(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. . . . "

Nevertheless, the court allowed the taking of the deposition, but also allowed the appellee to renew its objections at time of trial (CT 70). The unfairness to appellee of appellant's last-minute tactics is best shown by the objection made by defense counsel at the time deposition was taken.

> "We oppose the taking of this deposition or its subsequent use because . . . the one day's notice to us that this deposition was going to be taken was not sufficient under the Federal Rules of Civil Procedure or any other rule, because it does not give us sufficient time to adequately prepare for cross-examination, to consult with other medical specialists, and, of course, trial is only two court days away. It is, therefore, impossible for us to arrange medical examination, a subsequent medical examination of the plaintiff and if new issues, symptoms or injuries are raised by reason of this deposition, we are taken by surprise and no conceivable way that we can rebut or prepare a defense prior to trial. . . .
>
> "Furthermore, there is no necessity for this deposition to be taken inasmuch as this case having been filed over a year ago and at issue nearly a year, there have been four doctors in addition to the treating physician that examined the plaintiff on behalf of plaintiff's counsel. . . And this makes the fifth doctor that has been called as potential medical expert witness by the plaintiff. . . . "

> "Additionally, inasmuch as the purpose of this deposition is for the purpose of perpetuating testimony for trial rather than discovery, this amounts to the taking of evidence of a witness with only one day's notice to the defense that he was even going to be a witness in the case. As such, this gives us no possible way to investigate the background of this witness, his qualifications, or to prepare any possible impeachment or discover if any would be appropriate. The very purpose for which pre-trial discovery in the Federal Rules are designed is avoided if this deposition is used at the time of trial." (Deposition of Dr. John R. Mullins, pages 3 through 5).

One of the purposes of the discovery rules is the avoidance of surprise. As stated in 38 Columbia Law Review 1436:

> "The deposition-discovery device under the new rules aid in preparation for the trial more fully than any previous procedure. Such assistance is of several types:
>
> (1) Avoidance of surprise;
> (2) Affording an intelligent basis for trial brief;
> (3) The preservation of testimony likely to be needed."

Appellant's attempt to take Dr. Mullins' deposition two court days prior to trial, on one day's notice to the defense, certainly contravenes the purpose of the Federal Discovery Rule, and the trial court therefore properly excluded Dr. Mullins' testimony (by deposition).

In summary, the court on November 1, 1966, properly excluded both Dr. Burgess and Dr. Mullins as witnesses for good reasons, and did not arbitrarily decide which doctors could testify, as alleged by appellant. Such a determination was within the discretion of the trial court, and in recognition of the rules.

II.

THE COURT PROPERLY EXCLUDED TESTIMONY OF A MEDICAL EXAMINATION MADE ON THE DAY OF TRIAL.

Dr. Grossman, an internist, examined appellant in June, 1966. At that time he apparently did not take physical measurements of appellant's leg. Dr. Grossman then conducted another physical examination of appellant on the day of trial, without notice to defense counsel (RT 129), and attempted to introduce evidence relating to the medical findings made on the day of trial. Defense counsel objected to the evidence as follows:

> "Mr. Barer: I would object to any statement or questions or answers as to his examination conducted today. This examination today, if it did occur, is after the pre-trial order, after the time of discovery, there is no possible way we could havediscovered this medical testimony today. I feel this is outside the scope of the Federal Rules of Civil Procedure and that it should not be allowed into evidence in this courtroom."
>
> "The Court: Did you give counsel notice that you wish to have further exploration made today?"
>
> "Mr. Caughlan: No, your Honor."
>
> "The Court: The court will have to sustain the objection and does so."

Crucial to this objection is Rule 26(d)(2) of the Rules for the Federal District Court, Western District of Washington, which read as follows:

> "Unless otherwise ordered by the court, all parties shall exhaust the discovery procedures provided for in Rule 26 through 37, Federal Rules of Civil Procedure, prior to the conference of attorneys."

The appellee was given no notice of Dr. Grossman's examination on the day of trial in direct violation of the purpose of the Federal Rules, and was given no opportunity to prepare rebuttal testimony or even to make discovery, all in violation of the Federal Rules and Procedural Due Process. All medical information should have been exchanged at the time of the pre-trial order and appellant had no right to introduce without notice new evidence resulting from a medical examination conducted on the day of trial.

III.

THE COURT PROPERLY EXCLUDED WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRY RECORDS SHOWING PAYMENT OF PLAINTIFF'S MEDICAL BILLS

Appellant attempted to prove the existence and reasonableness of his medical bills by offeringevidence from the Washington State Department of Labor and Industries indicating that said Department had already paid all of appellant's medical bills. The appellee objected and counsel stated as follows:

> "We will not object to bills that were charged for services for Mr. Sowards being admitted into evidence nor the reasonable value being shown so long as there is no evidence admissible to show who paid for them, particularly the Washington State Department of Labor and Industries, because that necessarily involves the matter of discretion with them as to whether they honor the claim or think there is in fact any injury or think the bill is reasonable. We are not trying to prevent this man from proving his damages or what the bills were." (Tr 402)

The objection to said testimony and said records was properly sustained for the following reasons.

1. A showing that appellant's medical bills have been paid by someone other than appellant would be inadmissible without proof of a legal obligation.

2. A decision made by an administrative body would have no probative value in court without laying a proper foundation.

3. There was no privity between the appellee and the Washington State Department of Labor and Industries. The general rule is that testimony and evidence given at a trial cannot be used at a subsequent trial between different parties not in privity with the parties to the former action. Duffy v. Blake, 91 Wash. 140, 162 Pacific 521.

4. The fact that insurance is involved is entirely immaterial in a court of law, and the wanton introduction of such fact by the plaintiff is positive error, essentially prejudicial to the defendant, and constitutes grounds for reversal if plaintiff were victorious. William v. Hofer, 30 Wash. 2d 253 (1948); Moy Quon v. Furuya Company, 81 Wash. 526; Jensen v. Schlenz, 89 Wash. 268; Gianni v. Cerini, 100 Wash. 687; Lucchesi v. Reynolds, 125 Wash. 352.

The appellee did not object to appellant showing reasonable damages by the introduction of medical bills, and then having a doctor testify as to the reasonableness of such bills.

Appellant could easily have had either Dr. Gardner or Dr. Grossman, while they were on the stand, examine the bills and testify as to their reasonableness. However, appellant failed to elicit any testimony concerning medical bills from either of his doctors.

Appellant's citation of Standard Oil Coompany v. United States, 153 F2d 958 (9 Cir. 1946); and Rayfield v. Lawrence, 253 F2d 209 (4 Cir.1958), does not give any weight to appellant's argument inasmuch as the appellee admits that appellant is not barred from recovering damages merely because he also recovered insurance proceeds. This ruling in no way changes the requirement of proving damages by competent evidence.

IV.

THE DETERMINATION OF WHETHER A WITNESS QUALIFIES AS AN EXPERT IS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.

Appellant contends that the court erred in admitting the testimony of Morris Fishman on ground that he lacked qualifications as an expert. The law is well settled that the qualifications of a witness to testify as an expert is a matter within the discretion of the trial court. Bratt vs. Western Airlines, 155 F2d 850 (10 Cir. 1946); Rogh v. Bird, 239 F2d 257 (5 Cir.1956).

In Bratt, supra, the trial court sustained an objection to the opinion of an expert witness on ground that he was not

properly qualified to express an opinion. The opinion sought was as to the cause of the crash of a DC-3 commercial airplane. The witness was an aircraft mechanic who did not have a commercial pilots license and who had not been certified by the Civil Aeronautics Administration. However, he had had extensive experience as a private pilot and had substantial actual experience and training in aerodynamics. The Appellate Court reversed the trial court, stating that it had applied incorrect legal standards in refusing to permit the testimony. The court stated at page 853:

> "If actual experience cannot be the test in cases of this kind, when then does a witness become qualified to testify from special experience concerning the scientific cause of an accident not susceptible to direct proof. There is no prcise requirement as to the mode in which requisite skill or experience shall have been acquired. A witness may be competent to testify as an expert although his knowledge was acquired through the medium of practical experience rather than scientific study and research."

In Firemens Fund Insurance Company v. Collins, 220 F2d 150 (5 Cir.1955) the court approved the admission of expert testimony as to the effect upon a tractor-trailer of upsets by a witness who was the president of a trailer company and who was thoroughly familiar with the construction of trailer. See also Rich v. Ellerman and Bucknall S.S.Company, 278 F2d 704 (2 Cir.1960); Higgins, Inc. v. Hale, 251 F2d 91(5 Cir. 1958); Shipley v. Pittsburgh L.E.R. Company, 83 F.Supp. 722 (W.D.Penn. 1949); Allied Van Lines v. Parsons, 293 Pac. 2d 430 (Ariz. 1956).

V.

THERE WAS A FAILURE OF PROOF BY APPELLANT BOTH AS TO PROXIMATE CAUSE AND DAMAGES.

Plaintiff contends that the evidence does not support the court's judgment in favor of the defendant, especially in view of the fact that defendant admitted liability prior to trial for all injuries proximately caused by the accident on July 24, 1963. The following evidence supports the court's finding that the plaintiff's injuries, if any, at time of trial were not proximately caused by defendant's negligence on July 24, 1963:

1. The fact that plaintiff was involved in two accidents prior to July 24, 1963, and one more serious accident after, and on November 27, 1965, and plaintiff's inability and failure to segregate damages, if any.

2. Dr. Fein's testimony that he could find no objective findings to substantiate any physical impairment resulting from the accident on July 24, 1963 (TR 457, 459, 480).

3. Dr. Gardner's testimony infering the seriousness of the November 27, 1965, accident and injuries (TR 335).

The following evidence would allow the trial court to disbelieve all testimony rendered by plaintiff himself:

1. Plaintiff's attempt, while being examined by Dr. Fein, to impart false information as to his ability to turn his head without pain (TR 456).

2. Plaintiff's ability to work the day following the 1963 injury, contrary to medical advice, and for some time thereafter.

3. Testimony that plaintiff had never left subsequent employment for reasons of health.

4. Plaintiff's attempt to have a Certified Public Accountant falsify official record indicating dates on which plaintiff was employed and had been paid (TR 508, 509).

SUMMARY

Plaintiff had a fair, impartial, and lengthy trial. There is a failure of proof by plaintiff both as to proximate cause and damages, and there is ample evidence to support the court's judgment in favor of the defendant. The defendant respectfully prays that said judgment be affirmed.

Respectfully submitted,

Eugene G. Cushing

EUGENE G. CUSHING
United States Attorney

Michael J. Swofford

MICHAEL J. SWOFFORD
Assistant United States Attorney

DATED this 27th day of September, 1968.

CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 28 and 32 of the Federal Rules of Appellate Procedure and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL J. SWOFFORD
Assistant United States Attorney

DATED at Seattle, Washington, this 27th day of September, 1968.